IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 335 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

P K ROSHAN,

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 335 of 2002

MR MM TIRMIZI for Petitioner No. 1

MR KT DAVE, APP for Respondent No. 1

MR KJ SHETHNA for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 13/05/2005

CAV JUDGEMENT

1. The present Cri. Revision Application is

preferred under Section 397 R/w 401 of CrPC against the order passed by ld. Judicial Magistrate (F.C.), (Court No.3), Surat in Criminal Case No.4/2002 dated 11.07.2002. Vide order under challenge, ld. JMFC, after inquiry conducted under sec.202 CrPC, issued process against the petitioners for the offences punishable under sections 323, 504, 506(1) and 294(b) of Indian Penal Code. Respondent No.2 Rajendrasingh Madansingh Chauhan is the complainant of Criminal Case No.4/2002 (hereinafter after referred to as the complainant for convenience). The complaint against the present petitioner along with three other accused persons came to be filed by the complainant on 13.03.2002 alleging that the petitioner and other accused named in the complaint (Annex.A P.15) committed alleged offence on 03.03.2002 when the complainant was at his residence with his family during the communal riots and public disturbance that had taken place in different areas of city of Surat. It is alleged that the complainant and his two sons Himanshu and Jignesh are Advocates by profession and the petitioner at the relevant point of time was Deputy Commissioner of Police (DCP for short) in the city of Surat and the petitioner committed said offence jointly with abettors accused no.2 PI of Athwa Lines Police Station and accused No.3 PSI of Athwa Lines Police Station along with accused No.4 PSI who was serving as PSI in that very police station.That complainant was knowing all the four accused persons named in the complaint by face. It is alleged in the complaint that on 03.03.2002, during communal riots, the complainant contacted police control room at about 2.00 P.M. and requested to give police protection as their residence is adjacent to Muslim locality. It is alleged that within 10 minutes, all the four accused persons reached the house of the complainant and when wife of the complainant opened the door knowing that police has reached their house, she was assaulted by accused no.4 with lathi. When the complainant introduced himself that he is a lawyer, the present petitioner and original accused No.1 gave a slap on his right cheeck. Thereafter, on getting opportunity, the complainant closed the door. Thereafter, about 10 minutes thereafter, all the four accused came to the house of the complainant and complainant was assured that they are police personnels and have come to their rescue and, therefore, door was again opened by the complainant and at that time all the four accused had entered the house of the complainant, abused them with filthy language and complainant as well as his both the sons were given lathi blows. Thereafter, all the three were taken upto Chowk Bazar Killa Maidan and they were forced to run and then they were taken to Athwa Lines Police Station.

Thereafter, the complainant as well as his two sons were taken to Navsari Bazar Police Chowky in mobile van. On all the occasions, they were requesting the accused persons that they are advocates and law-abiding citizens and even then, they were threatened, ill-treated and assaulted. The major allegations are there in paras 5, 6 & 7 in the complaint.

2. On filing of a private complaint by complainant, inquiry has been conducted by the ld. Magistrate under sec.202 of CrPC and ultimately, he ordered to issue process against all the four accused persons for the aforesaid offences and that very order is under challenge on the grounds mentioned in paras 7(A) to (C) of the memo of Revision Application.

3. It is averred by the petitioner that the petitioner is an IPS Officer and at the relevant point of time, he was DCP of Surat City. On 03.03.2002, the complainant along with other number of accused persons had caused damage to the rickshaw and prevented a public servant and police officials from performing their duties. The complainant including other accused persons indulged into pelting of stones and, therefore, the offence was registered against them vide CR No.I.53/2002 with Athwa Lines Police Station for the offence punishable under sections 143, 142, 148, 188, 337, 435 and 332 of Indian Penal Code and section 135 of Bombay Police Act. The petitioner has also produced the copy of FIR of said CR No. I.53/2002. The complainant is shown as original accused No.27 in the said FIR and his two sons are also named as accused in the said FIR and it is the say of the prosecution qua the said FIR that all the accused persons named in the said FIR were arrested from the public place either while committing offence or while escaping after committing the offence from the spot on 03.03.2002. Detailed panchanama after arrest of the accused persons was drawn and panchanama is also tendered by the petitioner at Annex.C to the petition, and it is submitted that these documents were also brought to the notice of ld. JMFC. It is also alleged by the petitioner that at about 7.30 P.M., Investigating Officer of the said crime i.e. I.CR No.53/2002 had drawn a recovery panchanama at the instance of Jigneshbhai- son of the complainant and from his house and at the address where the complainant also resides, three glass bottles, one acid bottle and 10 stones were found in a gunny bag and prosecution very much relies on the said recovery. The police has filed chargesheet against all the accused persons named in the FIR including the complainant on 16.05.2002 and the complainant is appearing as an accused

No.27 and his son as accused No.11 in the said crime. The say of the petitioner before this Court is that in view of the riots that occurred from 28.02.2002 onwards, indefinite curfew was imposed on 02.03.2002 at about 1.35 P.M. as the communal disturbance had aggravated in the area under Athwa Lines Police Station on that day. The police officials including the present petitioner, therefore, were required to maintain law and order and were to perform their duties. The order passed under section 144 of CrPC by the competent authority on 2.3.2002 imposing curfew for indefinite period, is also produced with this petition at Annex.F. It is submitted that in view of totality of facts and circumstances as aforesaid, the ld. JMFC ought not to have issued the process vide order under challenge dated 11.07.2002.

4. It is prayed that the order of issuance of process requires to be quashed and set aside in the interest of justice mainly on the grounds mentioned in para-7 of the memo of the Cri. Rev. Application. It is argued by ld. counsel Mr. MM Tirmizi appearing for the petitioner that ld. Magistrate has materially erred in ignoring the provisions of sec.197 of CrPC. He has taken me through the entire scheme of section 197 of CrPC which is quoted in para-7(a) of the memo of Cri.Rev. Application. So, according to ld. counsel Mr. Tirmizi, it was obligatory on the part of the ld. JMFC to consider the scheme of sec.197 of CrPC and in absence of formal sanction from the competent authority government, the process could not have been issued and, therefore, the order issuing process should be quashed and set aside. It is argued that the present complainant is original accused No.27 in the FIR registered as CR No. I.53/2002 with Athwa Lines Police Station, for the offences punishable under Sections 143, 147, 148, 188, 337, 435, 332 of the Indian Penal Code and under section 135 of the Bombay Police Act. From the house of the complainant, 3 glass bottles, one acid bottle and 10 stones were found, and the panchanama was drawn to that effect. That the learned Magistrate ought to have appreciated that the order of the Commissioner of Police, Surat dated 2.3.2002 passed under the provision of Section 144 of the Criminal Procedure Code, stated that indefinite curfew be clamped from 1.35 P.M. onwards. Thus, when the offence occurred on 3.3.2002 the curfew was already imposed and despite that the accused persons of CR No.I.53/2002 registered with Athwa Lines Police Station, had committed the offence by committing breach of the order of the Police Commissioner, Surat. The accused persons were spotted and arrested and, therefore, the petitioner and his officers had merely performed

their duties. Thus, it was necessary that before issuance of process, the complainant herein viz. Virendrasinh Madansinh Chauhan, ought to have obtained sanction as per the provision of section 197 of the CrPC, and, therefore, the impugned order is illegal and erroneous and is required to be quashed and set aside. One more allegation made by ld. counsel Mr. Tirmizi before the Court is that as the petitioner was DCP, he has been falsely implicated in the alleged offence. He has no reason to enter the house of the accused complainant and that too before the time alleged in the complaint. The accused of CR No. I.53/2002 were arrested and it was not possible for any police officials including the present petitioner to make discrimination in giving treatment to the accused persons merely because accused belongs to a particular profession. Accused No.4 of the complaint filed by the complainant is the informant of CR No. I.53/2002 and at the time of incident, as per the said complaint, between 2.00 to 2.30 P.M., one autorickshaw bearing No. GEC 630 was set on fire by the mob and to control the mob of about 800 to 1000 people, teargas cells were used and one round of 303 bullet was also fired. Some of the accused persons were arrested on the spot and the persons who were able to escape from the spot, were arrested in couple of minutes and hours. This emerges from the arrest panchanama drawn by the Investigating Agency and panchanama drawn at the house of the complainant on 03.03.2002 between 19.35 & 20.00 Hours.

5. Considering the rival contentions, it emerges that some grave incident had occurred at about 2.00 PM in the relevant area mentioned by the petitioner as well as original complainant when the communal disturbance had aggravated and at that time the order imposing curfew for indefinite period was also in operation. The fact of imposition of curfew is not disputed even by the complainant. On the other hand, medical evidence led by the complainant and injury certificate produced during inquiry, reveal that the police has acted in harsh manner, but it would be difficult for the Court to accept that the officer of the rank of DCP would hold a lathi. It is very likely that he might have ordered his subordinate police officers including SRP Jawans on duty to see that each person available in the public place is caught and handled in an appropriate manner, if required. It is also possible that the present petitioner or even superiors of the present petitioner might have asked them to use reasonable force to control a violent mob. In this facts situation, the arguments advanced by ld. counsel appearing for the parties require to be

appreciated because the backbone of the argument of ld. counsel appearing for the petitioner is that even for the sake of arguments it is accepted without admitting that some wrong was committed by the police officers including SRP Jawans, he could not have been prosecuted without the formal sanction from the government in view of the scheme of section 197 of CrPC. Ld. Counsel Mr. MM Tirmizi appearing for the petitioner, has placed reliance on the following decisions in support of his submissions and this Court has carefully considered the relevant part of the cited decisions pointed out by ld. counsel Mr. Tirmizi;-

(i) Suresh Kumar Bhikamchand Jain v/s Pandey Ajay Bhushan and others, AIR 1998 SC 1524.
In the cited decision, the plea of the accused before the Magistrate was that the offence allegedly committed by him was in discharge of his official duty and that the Court had no power to take cognizance in absence of previous sanction of the government under section 197(1) of CrPC. Upholding the contention, the order taking cognizance was quashed and set aside. Considering the facts of the case, ratio of the cited decision would squarely apply to the facts of the present case.

(ii) A.K. Singh and Others v/s Uttarakhand Jan Morcha and others, AIR 1999 SC 2193.
In para-23 of the cited decision, the Apex Court has observed that the question of necessity of a sanction need to be considered by the Sessions Judge if and when raised by the accused. If the finding of the High Court is that no sanction is required, such finding has to be treated as bad mainly because the question has to be decided after taking into account various considerations including the fact situation in each case. Placing reliance on the ratio of this decision, it is therefore argued that the criminal case against the present petitioner should not be permitted to proceed on technical ground that the accused is not legally permitted to produce any document carving out a defence and even the plea of necessity of sanction. Ratio of this decision would also help the present petitioner.

(iii) Satish Chandra v/s Union of India and others, 1997 Cri.LJ 1210 (Delhi High Court).
In the cited decision, Delhi High Court has observed that even some excess is found to have committed resulting into damage to material lying, by itself, is no ground to ignore requirement of sanction under section 197 of CrPC. In the cited decision, the Traffic Service

Officer was being prosecuted. The Railway had given a contract to a firm for running a bookstall on the railway station. The firm failed to hand over vacant possession of the bookstall inspite of issuance of notice and Traffic Service Officer got the stall vacated by committing some excess. Delhi High Court allowed the petition under Sec.482 of CrPC and quashed the proceedings saying that the order of summons in such a situation can not be said to be an interlocutory order. Undisputedly, the order to summon affects the valuable right of an individual and it is observed by the Apex Court that there is no statutory bar in exercise of inherent powers of revisional jurisdiction vested with the Court if it is found that the Magistrate ought not to have issued process in absence of sanction. So, this Court, in the fact-situation of the present case, can positively quash the order issuing process.

(iv) State of Bihar v/s Kamla Prasad Singh and Others, 1998 SCC (Cri.) 1374.

In the cited decision, the Apex Court while appreciating the scheme of section 197 of CrPC, has held that "in discharge of his official duty, the Magistrate is supposed to consider not only the allegations made in the complaint, but also other material on record." It has been further observed that in the cited case the basic allegation in the complaint against the police officer was that police officer raided the house of the complainant without warrant, assaulted and abused wife of the complainant and others and took away certain articles belonging to the complainant. The Apex Court found that the material on record placed by the complainant was not disclosing the entire factual scenario and material facts were suppressed by the complainant and some of the allegations were false. For the sake of arguments, even if it is accepted that in the present case body of the present complainant as well as his sons were found injured when they were taken to the Magistrate in the capacity of the accused of CR.No. I.53/2002 and they were examined by the doctor of the government hospital, it would be difficult for the Court to say that none of the allegations in the complaint can be said to be either false or incorrect. The Apex Court in the circumstances of the case under appreciation, held that the sanction was necessary.

(v) Director of Inspection and Audit and others v/s C.L. Subramaniam, AIR 1995 SC 866.

Facts of the cited decisions are materially different, but the ratio of the decision is that when the offence alleged against the government servant if has

been committed by him while acting or purporting to act in discharge of the official duty, sanction to prosecute is required. The present petitioner, at the relevant point of time, was on duty and was supposed to act, and if required even harshly, against the members of mob by using police force under him. So, the excess is made by the subordinate police officer would not make him responsible for the criminal wrong punishable without obtaining the sanction required under section 197 of CrPC. In the facts and circumstances of the present case, ratio of the cited decision would squarely apply.

(vi) Ramkrishna Shankar Avhad v/s Rajendra Jagannath Parikh and another, 1997 CrLJ 183 (Bombay High Court).
The Bombay High Court observed that in the circumstances, there was no justification in issuing summons against the police officer as prior sanction for prosecution was required under sec.197 of CrPC. The complaint was against the police officer for demanding money and manhandling the respondent on refusal to pay. The complaint was filed without prior sanction. It was contended that prior sanction was necessary more so when a complaint against him was a sequel to earlier prosecution launched against the complainant on the same day for certain offences committed on the road in the presence of the police officer. When the complainant and his two sons are accused of one offence committed on that very day i.e. 03.03.2002 at relevant point of time i.e. at about 2.00 P.M., the ratio of the cited decision would squarely help the present petitioner is the submission which is, in the facts and circumstances of the case, is worth accepting.

6. As against that, ld. Sr.Counsel Mr.KJ Shethna appearing for the original complainant, relied upon following decisions and has submitted that the complaint should not be quashed.

(i) Raj Kishor Roy v/s Kamleshwar Pandey and Another, 2002 SCC (Cri.) 1423.
Relying upon this decision, it has been submitted by ld. Sr.Counsel Mr. Shethna that the complaint should not be quashed. According to Mr. Shethna, the facts of the present case may not be similar to the facts of the case before the Apex Court, but the ratio would positively go against the accused because in certain cases, it depends upon the nature of the acts complained of. The complaint can not be quashed at initial stage itself. The question of sanction can be raised at any time after the congnizance of the offence is taken, may be even at the time of conclusion of trial and in the

cases like the present one, question whether accused acted in the course of performance of his duties and/or whether the defence was pretended or fanciful could only be examined during the course of trial and after giving an opportunity to both the parties to establish their case. An advocate by profession and his entire family including two sons that too who are advocates have been beaten by the police severely, number of injuries found on the body of the person complainant and his two sons, are the sufficient evidence as well as oral evidence led by the doctor during inquiry, indicates that such a wrong can not be said to have been committed in proper discharge of the official duty. The Court can not ignore the right flowing from Article 21 of the Constitution of India. It is argued by Mr. Shethna that accepting the ratio propounded in the above-cited decision, revision application should be dismissed.

(ii) The next decision relied upon by ld. Sr.Counsel Mr. Shethna is in the case of SS Khandwawala (IPS) Addl.DGP (Training) v/s State of Gujarat, 2003(1) GLR 802 (Cri. Rev.Application No. 568/2001 decided on 29.07.2002 by Hon'ble Mr. Justice D.H. Waghela).

In the cited decision, this Court was dealing with the matter where a Senior IPS Police Officer Mr. SS Khandwawala was facing prosecution arising from a complaint of inhuman torture of a person accused in police custody for three days from 10.10.1976, where this Court, after considering various decisions of the Apex Court, has held that "..... It is for the prosecution to establish the essential ingredients of the alleged offences. But even by the alternative version introduced for consideration by the petitioners, by no stretch any part of the alleged acts was even claimed to be committed while discharging the official duty or to be within the permitted range of official duties of the petitioners. Therefore, it would appear that the claim of the petitioners to the protection of section 197 of the Cr.P.C. is pretended and fanciful even as none of the alleged acts constituting the offence could even be claimed to have any nexus with the performance of duty of the purported discharge of any official duty."

(iii) Placing reliance upon the decision in the case of Chandra Deo Singh v/s Prakash Chandra Bose @ Chabi Bose and another, AIR 1963 SC 1430, it is argued that since the object of inquiry under section 202 CrPC is to ascertain whether the allegations made in the complaint are intrinsically true, the Magistrate acting under S.203 has to satisfy himself that there is sufficient ground for proceeding. Where the Magistrate has ordered an

inquiry under S.202 and at the end of inquiry decided to issue process, the accused should not be permitted to intervene during the inquiry and a defence placed by him can not be considered as this would frustrate the very object of the legislature. So, it is now not open to turn down the process in exercise of revisional powers vested with the Court and the petitioner should be asked to place his defence during trial.

(iv) In the case of Ratanlal Didwania v/s State of Gujarat (Cri. Misc. Application No. 1358/1996 decided on 12.03.1997 decided by Hon'ble Mr. Justice S.D.Pandit), this Court has held that where it is not possible for the Court, prima facie, to come to a conclusion that the complaint lodged is either frivolous, malafide or without any foundation, such a complaint should not be quashed. According to ld. Sr.Counsel Mr. Shethna, quashing of the order issuing process against the present petitioner would result into quashing of the complaint against the petitioner. The facts of the present case are such that it is not possible to say at this stage that the complaint is false or frivolous.

(v) Ld.Sr.Counsel Mr. Shethna has placed reliance on one more decision of this Court in Misc. Cri. Application No. 1834/1982 (decided on 27.04.1983 by Hon'ble Mr. Justice V.V. Bedarkar). This Court, while dealing with the said petition moved under section 482 of CrPC, observed that the Court is not supposed to enter into the details that may be placed by the defence side prior to issuance of process and the Court is not authorised to look into the defence that may be available to the accused. So, it will be difficult for the Court to say at this stage that the order of issuance of process is bad.

7. Having considered the facts of the above-cited decision and the facts and other details brought before the Court by ld. counsel appearing for the parties, it would be difficult for the Court to accept the say of ld. Sr.Counsel Mr. Shethna that the observations made by this Court in the case of SS Khnadwawala (supra) would in any way help the original complainant and can be used against the petitioner because the case was found to be ruthless custodial interrogation for several hours and there was no scope for the accused to overpower the police personnel. So, on facts, the Court found that injury caused to the accused can not be said to be caused or must have been inflicted in discharge of the duty. The Court has mainly hammered that the necessity of sanction was discussed and decided on earlier occasion also. Therefore, this Court has not entered into that

aspect in detail and on grave facts, finding has been recorded. In the same way, other decisions relied upon by ld. Sr.Counsel Mr. Shethna referred to above, also would not help the respondents in opposing the present Cri. Rev. Application because they are not dealing with the revisional powers vested in the Court and the scope of exercise of revisional jurisdiction vested in the Court when it is pointed out that the order passed by the trial court is apparently bad in the eyes of law or on any other grave count like perversity etc.

8(i) It is true that in a given case, things can be left to the trial as decided by the Apex Court in the case of Raj Kishor Roy (supra). However, in the cited case, it was found by the Apex Court that responsible police officer falsely implicated the appellant and his brother by showing recovery of illegal weapon and cartridges from them because the appellant did not pay anything out of his earnings. High Court, in exercise of the powers vested under section 482 of CrPC, has quashed the complaint on the ground that even if the facts were true, then also, the case would come within the purview of section 197 of CrPC.

8(ii) Of course, the ratio of the decision in the case of Raj Kishor Roy (supra), has not been considered by the Apex Court. However, the similar view has been taken by the Apex Court in the decision in the case of K.Kalimuthu v/s State, 2005 AIR SCW 2039, whereby the Apex Court has held that "act done by accused was in discharge of official duties and hence he was entitled for protection under S.197, need not necessarily be considered as soon as the complaint is lodged and on the allegations contained therein. Such plea can be considered at subsequent stage." In the cited decision, the High Court, by reversing the order passed by the trial Judge, taken the view and declined to consider applicability of sec.197 of CrPC at the stage of taking cognizance by the trial Court and the Apex Court observed that the finding recorded by the High Court is not invalid. The pivotal issue that there is application of section 197 of CrPC is under consideration and it was considered by the Apex Court in the case of Bakhshish Singh Brar v/s Smt. Gurmej kaur, AIR 1988 SC 257, wherein the Apex Court has observed thus;

" It is necessary to protect the public servants in the discharge of their duties. In the facts and circumstances of each case protection of public officers and public servants functioning in discharge of official duties and

protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. It is true that Section 196 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties then the trial may have to be stayed unless sanction is obtained. But at the same time it has to be emphasized that criminal trial should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence."

So, the Court is supposed to find the balance while dealing with the plea raised by the accused. In para-7 of the decision in the case of K.Kalimuthu (supra), it is observed by the Apex Court thus;

"7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they were acting or purporting to act as public servants ...."

It has been further observed in the same para that;

" ....If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it."

The Apex Court in the cited decision of K.Kalimuthu (supra), has considered its earlier decision in the case of P. Arulswami v/s State of Madras, AIR 1967 SC 776 wherein the Supreme Court has said thus;

" It is quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable. "

It would be beneficial at this stage to reproduce the observations of the Apex Court in the case of B. Saha and others v/s M.S. Kochar, 1979(4) SCC 177. In the cited decision, the Apex Court has discussed phraseology and language of section 197(1) of the CrPC and especially the phrase 'any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty" and the Apex Court has observed thus;

" If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197 (1), an Act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution and the said provision."

The expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. In the present case, the

petitioner and others were undisputedly discharging his duty of controlling a mob of about 600 to 800 people at relevant point of time and that too during communal riots that had taken place in the city of Surat. So, on facts, it is prima facie found that act or omission for which the present petitioner and others are being prosecuted, was an activity in discharge of their duties and the complainant has made a grievance and even if it is found that they have exceeded, even then the application of section 197 of CrPC can not be disputed. Even the Apex Court in para-12 of the cited decision in the case of K. Kalimuthu (supra), has observed as under:-

> "12. If on facts, therefore, it is prima facie found that that act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code can not be disputed."

It is not necessary to quote all the four decisions referred to by the Apex Court in paras 13 & 14 of the cited decision in the case of K.Kalimuthu (supra). However, it would be beneficial to quote certain observations made in para-14 of the said judgment in the case of P.K. Pradhan v/s State of Sikkim, 2001(6) SCC 704, wherein it has been observed thus;

> " There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though possibly in excess of the needs and requirement of the situation."

In the decision of K.Kalimuthu (supra), the Apex Court was dealing with the question of law in three different Special Leave Petitions and the case of the prosecution was that the appellants were guilty of various offences punishable under Indian Penal Code and under Sec.5(2) R/w Sec.5(1)(d) of The Prevention of Corruption Act, 1947 (Old Act) and the Court found that the scheme of section 19 of The Prevention of Corruption Act is also relevant. As per the facts, the Principal Special Judge for CBI Cases, Chennai, had accepted the

plea of the accused persons that in absence of requisite sanction under section 197 of CrPC, it was beyond the jurisdiction of the Court to take cognizance of the alleged offence. But after appreciating the facts, the High Court had said that it was not necessary to decide the point of sanction and this can be appreciated at subsequent stage during the course of trial and on facts, the Apex Court found that no error has been committed by the High Court. The facts on hand are materially different and, therefore, the observations of the Apex Court in the decisions referred to above would help the petitioner.

(iii) Undisputedly in the present case, relevant area of Athwa Lines Police Station was under curfew and it is not the case that only three persons have been implicated and made accused to get rid of the complaint that may be made by the complainant and/or his sons or any of them. As per the independent police record, they were arrested from a mob and were in custody of police along with number of other accused persons. Without appreciating the story of opening of doors, then closing of it and again reopening of the doors etc., it is clear that some objectional articles were seized from the house of the complainant under a recovery panchanama on the date of the complaint i.e. on 03.03.2002. At that time, the accused were even taken before the ld. Magistrate. So, the police may not have impression on the evening of 3.3.2002 that either the complainant or one of his sons may decide to file a complaint or to make any complaint before the ld. Magistrate as and when produced or any time thereafter.

(iv) So, it is likely that all police personnels on duty at the relevant point of time, might have acted only with a view to control the crowd in a harsh manner and in such a situation, a lathi of a police personnel is not able to identify the status or profession of an individual in a mob. On one hand, if police acts softly and in a cordial way in serious or very disturbing situation during communal clash, then officials may be critisized and sometimes even are asked to face departmental proceedings on account of alleged inaction or for not taking proper harsh steps for curbing the offending act or acts of a big mob of about 800 to 1000 people and on the other hand, if some harsh, strict and stern actions are taken by senior police personnels through their subordinate officers or police personnels, then senior most person in charge normally is being blamed and prosecuted. It is not possible otherwise to identify the actual lathi-blower. There should not an

attempt to justify a wrong and such acts are condemnable, but it is equally true as argued that it should be held to be an act done in purported discharge of the duty. Police in such a situation is under an obligation to see that even by ordering fire or by throwing teargas cells, mob is controlled and the maximum number of wrongdoers are identified and arrested at the earliest. Each stern or strong action by a police in such a situation can not be said to be an offence. Even if it is accepted for the sake of arguments that such an act can be termed as an offence, then also, the officer like the present petitioner should not be asked to face trial unless the State accords sanction to prosecute under section 197(1) of CrPC. It is not necessary to reproduce the relevant part of the above-discussed decisions relied upon by the ld. counsel appearing for the petitioner, but the observations made by three different High Courts and the Apex Court in more than one decisions referred to herein above, squarely applies to the facts of the present case and would help the petitioner and it is necessary to observe that in such or similar cases, no prosecution ought to have been ordered by issuing process in absence of formal sanction by the competent authority government. Thus, the order of issuance of process is bad, illegal and petitioner should not be compelled to face prosecution.

9. Placing reliance on the decision in the case of Smt. Surmila Singh v/s Sahdeo Ram and Others, 1998(3) Crimes 32 (Patna High Court), ld. Counsel Mr. Tirmizi submitted that impugned order should be quashed. In the cited decision, Patna High Court was dealing with the petition under section 482 of CrPC. It has been observed by the Patna High Court that when the petitioner was summoned in a complaint case and the complaint on its face seemed to be frivolous one, the proceedings were abuse of process of Court and were liable to be quashed. It is argued that in view of the facts of the present case placed before the ld. Magistrate and the fact that it was not possible for the petitioner to beat physically by lathi or otherwise, the complaint against the petitioner ought to have been dismissed holding it to be frivolous. So, on merits, there was no need to issue the process. Considering the facts of the case, the ratio of the cited decision would also help the present petitioner.

10. For the reasons aforesaid, Cri. Revision Application is allowed. Impugned order passed by ld. Judicial Magistrate (F.C.), (Court No.3), Surat in Criminal Case No.4/2002 dated 11.07.2002 issuing process

against the present petitioner is hereby quashed and set aside. Rule is made absolute accordingly.

[C.K. BUCH, J]

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